PANEL CONSISTING OF ROBERT PITOFSKY, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC; CASS R. SUNSTEIN, PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL AND DEPARTMENT OF POLITICAL SCIENCE, CHICAGO, IL; AND MARTHA MATTHEWS, STAFF ATTORNEY, NATIONAL CENTER FOR YOUTH LAW, AND FORMER LAW CLERK TO JUDGE STEPHEN G. BREYER, SAN FRANCISCO, CA

STATEMENT OF ROBERT PITOFSKY

Mr. PITOFSKY. Thank you, Senator Kennedy. It is a privilege to be invited to testify in these important hearings.

I believe that Steve Breyer from all points of view is an outstanding nominee to the Supreme Court. I will concentrate today, however, on that part of his record dealing with economic regulation and particularly his record in antitrust. That record has been subject to very thoughtful questions by Senator Metzenbaum and others on the committee, and subject to some criticism by witnesses who testified a little earlier today.

I recognize two themes in the criticism. One is sort of a numbers game approach that Judge Breyer is supposed to have decided an unusual number of cases in favor of defendants in antitrust cases, and then there has been some criticism of specific decisions.

As far as the numbers game is concerned, first of all, if people are going to use the numbers game approach, they ought to get their numbers right. The claim is—I have heard it repeatedly today—that he decided 16 consecutive cases against the defendant. Actually, the score was 14 to 2, and I cited two cases for the plaintiff in my prepared testimony. Also, the fact is that in all Federal courts, 75 percent or so of cases are decided in favor of defendants in antitrust matters. So if the record had been 12 to 4, it would have been average, and in Judge Breyer's court it turns out to be 14 to 2. That is hardly a devastating disclosure.

But, in any event, I did not want to play the numbers game. I think that approach asks the wrong question. The real issue is not whether the plaintiff or defendant wins; it is whether the competitive process and consumers win. And that can occur if the plaintiffs prevail or the defendants prevail. And as I will try to discuss in a moment, I believe in the cases for which he has been most criticized, the competitive process and consumers won.

Also, we are talking here about 14 cases decided in favor of defendants, but many of them involved trivial issues from the point of view of antitrust policy. One case addressed the question of whether Puerto Rico was a State or a territory. Well, it came up in an antitrust case, but that is hardly an antitrust policy question.

Another case involved the issue of whether a judge should recuse himself because of a conflict of interest.

In two cases, Judge Breyer and his colleagues denied a preliminary injunction, but the parties were then free to litigate the merits of the case in the following proceeding, and in two cases, the plaintiff was the large company and the defendant was the small company. So that when he found in favor of the defendant, he was hardly finding in favor of big business.

Turning to the specific cases, three have been criticized, or maybe four—*Subaru* was mentioned in the earlier hour—*Boston Edison, Barry Wright, Kartell* and *Subaru.* First of all, let me start by saying that several of these cases—*Boston Edison* and *Barry Wright* in particular—have something in common, and that is that the plaintiff is a small company, the defendant is a large company, and the plaintiff comes into court and says: My rival is too aggressive, its prices are too low; its strategy is too aggressive, and asks that the antitrust law remedy the losses that it is suffering in the marketplace.

Let me be specific. Frankly, we have heard more about price squeeze in these hearings than the world has heard about price squeeze in 104 years. I am aware of only two price-squeeze cases in the nonregulated market that have ever been won by a plaintiff in 104 years, and both those cases are 50 years old. So the fact that Judge Breyer found against the plaintiff in a price-squeeze case is common rather than unusual.

In a price-squeeze case, as you heard many times over, the plaintiff comes in and says, I must buy from and compete with my supplier. And, therefore, if my supplier makes the wholesale price too high and its retail price too low, I get squeezed, and I cannot earn a decent living.

As I say, those cases are rare, and ordinarily, what the plaintiff is saying is get the retail price up so I can do better in the marketplace. The plaintiff may win that case, but consumers will pay the bill if the retail price goes up.

In *Boston Edison,* I agree with Senator Metzenbaum that had Judge Breyer and his colleagues found the other way around, $36 million would have gone to these two Massachusetts municipal utilities, and I assume it would have been passed on to consumers. But the rule of law would have been that the company exercising the squeeze must get its prices up in order to protect the profits of the small company, and consumers would have lost as a result of that.

Now, I heard today for the first time the argument that that is not necessarily the case. An alternative would have been that the wholesale price would come down and the retail price would stay the same. That is not plausible in this case. The background in this case was that Boston Electric had gotten authority to raise the wholesale price from a Federal regulatory agency, FERC. The same plaintiffs who came into court in the antitrust case then challenged FERC in a judicial proceeding, and they lost there as well.

Therefore, it seems to me that the plaintiffs had to accept the fact that the wholesale price was fair, and the only thing left for them to do—and I read the case as one in which this is exactly what they did. They said get the retail price up as long as the wholesale price is going up. Consumers would have lost.

Barry Wright is even a clearer case because I would grant that *Boston Edison* can be argued both ways. I think Breyer came out correctly. In *Barry Wright,* a small company selling environmental devices says to them, My large rival is giving 25-percent discounts, and as a result, I cannot survive in the marketplace. But Judge Breyer saw the point that when you start regulating how low

prices can be, you interfere with the competitive process, and the result is consumers do not get the benefit of the low price.

He recognized that prices sometimes can be so low that they are predatory and ought to be actionable, but he noted in this case that the prices that *Barry Wright* was complaining about were above full cost. And as a result, that company must have been more efficient than its rival and was passing these benefits along to consumers.

Kartell, all I can say about that case is that doctors were trying to get more money. Blue Cross was trying to keep the prices low, and he found in favor of cost containment.

Let me say in conclusion, the suggestion is that Judge Breyer's opinions are arid, theoretical, impractical. I just do not see it. In every one of these cases, the competitive process is what he is concerned about. Consumer welfare is what he is concerned about. He is skeptical of using the antitrust laws to prevent companies from being aggressively competitive, and I do not see that as arid, theoretical, or impractical.

Thank you.

[The prepared statement of Mr. Pitofsky follows:]

PREPARED STATEMENT OF ROBERT PITOFSKY

BIOGRAPHICAL INFORMATION

Professor of Law, Georgetown University Law Center and of Counsel, Arnold & Porter, Washington, DC.

Formerly held positions as Director, Bureau of Consumer Protection, Federal Trade Commission; Commissioner, Federal Trade Commission; Dean of Georgetown University Law Center; Professor of Law at New York University School of Law and Visiting Professor of Law, Harvard Law School.

Co-Author of *Cases and Materials on Trade Regulation* (with Milton Handler, Harlan M. Blake, Harvey Goldschmid), third edition 1990 and author of numerous books and articles on antitrust including *Revitalizing Antitrust in its Second Century* (1992, co-editor); *Proposals for Revised U.S. Merger Enforcement in a Global Economy,* 81 Geo. L. Rev. 195 (1992); *Definition of Relevant Market and the Assault on Antitrust,* 90 Colum. L. Rev. 1805 (1990); *The Political Content of Antitrust,* 127 U. Pa. L. Rev. 1051 (1979); *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions,* 78 Colum. L. Rev. 1 (1978); and *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv. L. Rev. 1 (1978).

Member of the Council, Administrative Conference (1980–1981); Member of the Board of Governors, D.C. Bar Association (1981–1984); Member of the Council, Antitrust Section of the ABA, (1986–1989).

I appreciate the opportunity to testify in these hearings concerning the confirmation of Stephen Breyer as a Justice of the Supreme Court.

I intend to discuss Judge Breyer's record as a scholar and judge in the field of antitrust. In this testimony, I will focus upon two lines of criticism that have been directed at Judge Breyer's record: (1) it is said that in his judicial opinions, Breyer has consistently ruled in favor of defendants, producing what has been characterized as pro-Big Business and anti-consumer results; and (2) the results reached in several particular cases are said to favor Big Business over the consumer.

In light of the fact that Judge Breyer has so often reached conclusions in antitrust cases that favor defendants, it is most appropriate for members of the Committee to inquire carefully about this antitrust record. My own view is that his opinions, fully examined, do not evidence any antipathy to antitrust enforcement. Certainly, there is no Big Business bias. His opinions, of course, speak for themselves. Given the facts before him in those cases, there is little reason to contend that he could have reached different conclusions.

Before turning to specifics, let me say that I have read all of Judge Breyer's antitrust opinions and many of his books and articles. I believe his approach to antitrust is thoughtful and enlightened. He would leave the free market alone when it is serv-